Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the
SUPREME COURT OF THE UNITED STATES

SHAWNEE PATTEN,

Petitioner,

v.

WAL-MART STORES EAST, INC.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether plaintiff has proven a violation of Title I of the Americans with Disabilities Act if she establishes by a preponderance of the evidence, direct or circumstantial, that her disability was "a motivating factor" in an adverse employment action.

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PETITION FOR A WRIT OF CERTIORARI

Shawnee Patten respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 300 F.3d 21. The opinion of the district court was rendered orally and was unreported.

JURISDICTION

The court of appeals entered its judgment on August 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Title I of the Americans With Disabilities Act, 42 U.S.C. §12112(a), provides, in relevant part, as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees.

The Civil Rights Act of 1991, 42 U.S.C. §2000e-2(m), provides, in relevant part, as follows:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice,

even though other factors also motivated the practice.

STATEMENT OF THE CASE

Petitioner, Shawnee Patten, brought this action against Respondent, Wal-Mart Stores East, Inc. ("Wal-Mart"), under Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. §§ 4551 et seq. The United States District Court for the District of Maine had proper subject matter jurisdiction over Patten's federal claims pursuant to 28 U.S.C. § 1331, and 42 U.S.C. § 2000e-5(f). Following a jury verdict in Wal-Mart's favor, the district court entered final judgment for Wal-Mart on September 19, 2001. Pursuant to 28 U.S.C. § 1291, Patten filed a timely appeal to the First Circuit Court of Appeals, and the First Circuit affirmed judgment in Wal-Mart's favor on August 14, 2002.

Patten has filed this Petition for a Writ of Certiorari because the district court improperly instructed the jury that she was required to prove that her disability was "the determining factor" in her termination as opposed to "a motivating factor."

The jury found that Patten has a "disability" within the meaning of the ADA. She has Charcot-Marie-Tooth disease ("CMT"), which she refers to as muscular dystrophy. Both Patten's and her neurologist's testimony established that Patten's CMT rendered her substantially limited in her ability to walk.

The evidence also established that Patten's CMT-related accommodations, including leaves of absence and job modifications, did not cause Wal-Mart an "undue hardship" within the meaning of the ADA. Gerald Tyler, the Store Manager, testified that the leaves of absence and job modifications did not cause an undue hardship. He testified that Patten met

expectations throughout her employment until June 3, 1998, approximately six weeks before her termination on July 19, 1998.

The disputed issue at trial was whether Patten was fired because of her disability. Wal-Mart alleged that Patten was fired because she was excessively absent for reasons unrelated to her disability. The jury apparently agreed that this was at least a reason for Patten's termination, because it rendered its verdict in Wal-Mart's favor. The evidence also showed, however, that Patten's disability was at least "a motivating factor" in her termination.

When Patten applied in September 1997 for her job at Wal-Mart, she wrote on her application that she had muscular dystrophy. She told the person who interviewed her, Stephanie Gill, about how her muscular dystrophy affected her. Ms. Gill told the Store Manager, Gerald Tyler, that Patten had muscular dystrophy. Mr. Tyler knew that Patten's muscular dystrophy made her body unable to function properly. The personnel manager, Theresa Barrows, also knew that Patten had muscular dystrophy. The Assistant Store Manager, Paula Carey, had access to Patten's application.

Ms. Gill told Patten that they were hiring in the infant department, and Patten was hired as a sales associate in that department. Gill said that if Patten felt that she could not do the job, then to let Gill know, and Gill would change Patten's job.

Patten did have difficulty in the infant department because she was unable to climb a ladder, which was necessary in order to reach items on shelves in the department. Patten could not climb the ladder because her muscular dystrophy affected her balance. Patten spoke with her supervisor, and she explained that her problem was from her muscular dystrophy. The supervisor told Patten that she was hired for the job in the infant department, and she needed to stay in that department and finish her job.

Patten then spoke with Ms. Gill, and she said that she was having a very hard time. Patten explained to Ms. Gill that the problem she was having was from her muscular dystrophy. In response, Patten was transferred to a cashier position. Patten had been in the infant department for approximately two weeks.

In October 1997, Patten fell on a soda can near her car, and she suffered a back injury. As a result of that injury, she had restrictions of no standing, no bending, no lifting, no stooping, and no zoning, and the restrictions lasted until December 1997.

In addition, Patten had a leave of absence from January 2, 1998 through January 27, 1998 for a heart condition that was induced by caffeine.

Patten had surgery to treat her CMT on February 26, 1998, and she had leave of absence for her surgery from February 24, 1998 through June 1, 1998. Ms. Barrows and Mr. Tyler knew that Patten's surgery was to treat her muscular dystrophy.

During Patten's leave, she telephoned Ms. Barrows from time to time and went to Wal-Mart in person. During the telephone conversations, Barrows told Patten that if she did not hurry up and come back to work she may not have a job to come back to. Patten told Mr. Barrows that she was slower to heal than others because of her disability. Ms. Barrows reacted negatively, and, the next time Patten went in, Ms. Barrows again told Patten that if she did not hurry up and come back to work, she would not have a job.

In the end of May 1998, Patten went to Ms. Barrows' office and told Ms. Barrows that she was going to see her foot doctor the following day. Ms. Barrows responded by saying, "well, if he tells you that you cannot come back to work yet, you will be fired. You will not have a job."

Patten saw her doctor on June 2 or 3, 1998, and he released Patten to return to work. Her restrictions were that she could only work four hours per day, and she could only stand for one of those hours. Patten was still having problems from the surgery at that point; her foot was swelling, and she was wearing a boot cast instead of a shoe.

Patten gave her restrictions to Theresa Barrows on the day she returned to work, and Ms. Barrows sighed and told Patten to return to the cash register. Patten told her Customer Service Manager ("CSM") that she needed a stool because she had been standing for longer than one hour. The CSM said that she needed to speak with Mr. Tyler, and when the CSM returned she said that Mr. Tyler told her that Patten could not work if her doctor's note said she could only stand for one hour. Tyler then changed his mind, and he assigned Patten to the lawn and garden department as a people greeter for one month.

On the day that Patten returned to work, she went to the rear of the store to clock in and she heard her name being used around the corner. She peaked around the corner, and she saw Theresa Barrows, Gerald Tyler, and the Assistant Store Manager, Paula Carey, all having a conversation about Patten. At trial, Patten recounted what she heard as follows: "They were saying we know that Shawnee has a disability, but we're just tired of this. We're tired of her, and we just don't feel that she needs to be here."

Patten returned to the cashier position on July 8, 1998. On July 17th Patten called in sick because she had a very bad earache and she was dizzy. She spoke with Gerald Tyler about it, and he excused Patten's absence. On July 19th Patten went to work in the morning, but she was still not feeling well, she was still dizzy and light headed, she still had a very bad earache, and she had a temperature. A front CSM told Patten that she did not

look well, and Patten asked the CSM to ask management if she could go home.

After this request, Paula Carey called Patten into her office, and Carey said that she "and Gerald have been talking about this for a while. We understand that you have health problems. We understand that you are disabled, but we don't want you working in this store." When Patten asked if she was being fired because of her disability, Carey said, "you may take it as you want, but you are not working here." Patten had not had any contact with Carey since she witnessed Carey's conversation with Tyler and Barrows on the day she returned from her CMT-related leave.

Paula Carey testified that she terminated Patten's employment because of poor attendance. She claimed that Patten's attendance was only a problem during the final two or three weeks of Patten's employment. Patten presented extensive evidence–including her own testimony about her good attendance, Wal-Mart's attendance polices, the absence of warnings, and records showing good attendance–that contradicted Wal-Mart's claim that Patten was terminated for poor attendance during the last weeks of her employment.

At the conclusion of the case, the trial judge instructed the jury, in part, as follows:

> Termination. To succeed on her claim, Shawnee Patten has the burden of proving by a preponderance of the evidence that her disability was the determinating factor in the decision to discharge her. . . . To prove that a disability was the determining factor in the decision to terminate her, Shawnee Patten is not required to prove that it was the sole motivation or the primary motivation for Wal-Mart's decision, but she must

> prove by a preponderance of the evidence that her disability actually made the difference in causing Wal-Mart to terminate her employment.

Patten's counsel objected to this instruction and requested a mixed motive jury instruction, which would have required Patten to prove that her disability was "a motivating factor" in her termination rather than "the determining factor." Appendix at 13. The court overruled Patten's counsel's objection on the basis that Patten had not introduced sufficient "direct evidence" of discrimination to justify a mixed-motive instruction. Appendix at 14.

On appeal, the First Circuit held that "the determining factor" is the appropriate standard in circumstantial evidence cases. See Patten v. Wal-Mart Stores East, Inc., 300 F.3d 21 24-25 (1st Cir. 2002). The court held that only in "direct evidence" cases is plaintiff entitled to a mixed-motive analysis, which would require plaintiff to prove that her disability was "a motivating factor" in her termination. See Patten v. Wal-Mart Stores East, Inc., 300 F.3d at 25. The court held that plaintiff did not present sufficient "direct evidence" of discrimination to justify a mixed-motive instruction. See Patten v. Wal-Mart Stores East, Inc., 300 F.3d at 25-26.

REASONS FOR GRANTING THE PETITION

I. The First Circuit Decision Conflicts with the Ninth Circuit.

The First Circuit Court of Appeals decision that plaintiff is entitled to an "a motivating factor" instruction only with a showing of direct evidence conflicts in principle with the position taken by the Ninth Circuit Court of Appeals. In Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002), the Ninth Circuit held that "the plaintiff in any Title VII case may establish a violation

through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'a motivating factor.'" Id. at 853-54.

Although Costa involved an interpretation of Title VII of the Civil Rights Act of 1964 ("Title VII"), the court's decision is applicable to ADA claims. Both statutes contain the identical "because of" standard for causation. Title VII makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added). Similarly, the ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual. . . ." 42 U.S.C. § 12112(a) (emphasis added).

Admittedly, in Costa, the Ninth Circuit relied on a provision in Title VII that is not present in the ADA. Title VII was amended by the Civil Rights Act of 1991 to read, in part, as follows:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added).

Nevertheless, all of the Circuit Courts of Appeals to address the issue have held that this provision is applicable to ADA claims as well. Parker v. Columbia Pictures Industries, 204 F.3d 326, 337 (2nd Cir. 2000); Daye v. School Bd. of City of

Norfold, 2001 WL 1023213, *1 (4th Cir. 2001); Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1033 (7th Cir. 1999); Belk v. Southwestern Bell Telephone Co., 194 F.3d 946, 950 (8th Cir. 1999). Accordingly, this Court should resolve a conflict in principle that is sure to become a direct conflict after Costa is applied to ADA claims.

II. Resolution of This Issue is Important.

The lower courts are hopelessly enmeshed in a tangle of case law in which the courts have tried unsuccessfully for over a decade to make sense of the prevailing scheme for proving causation in employment discrimination cases. The only principle that is clear from reading of these cases is that it is unworkable to maintain two different standards of proof depending on whether the evidence is characterized as "direct" or "circumstantial." In order to bring this area of the law in line with all others, this Court must recognize a single standard of proof applicable to employment discrimination cases.

The standard that this Court should adopt is that disparate treatment employment discrimination plaintiffs have met their burden of persuasion if they prove by a preponderance of the evidence that their protected-class status was "a motivating factor" in the adverse employment action, regardless of whether the evidence is characterized as direct or circumstantial. Upon such a showing, the burden of persuasion shifts to defendants to prove that they would have taken the same employment action in the absence of the impermissible motivation.

The standard articulated by the district court below and the First Circuit originated in Justice O'Connor's concurrence in Price Waterhouse v. Hopkins, 109 S.Ct. 1775 (1989). In Price Waterhouse, the plurality opinion by Justice Brennan, speaking for three Justices on the Court, adopted a standard for causation similar to that proposed by Patten: "We hold that when a plaintiff

in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account." Price Waterhouse v. Hopkins, 109 S.Ct. at 1795.

Justice O'Connor's concurrence, however, has been cited by courts as the holding of the court. See, e.g., Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999). Justice O'Connor wrote that plaintiffs should only be able to avoid proving "but for" causation if they can show by "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." Price Waterhouse v. Hopkins, 109 S. Ct. at 1805. Nevertheless, even Justice O'Connor contemplated that the term "direct evidence" would not be limited to direct evidence in the standard sense, meaning evidence that proved a fact in issue without the benefit of inference. See Price Waterhouse v. Hopkins, 109 S. Ct. at 1805 ("Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status.") (O'Connor, J., concurring) (emphasis added).

Considerable confusion has arisen in this area because the Circuit Courts of Appeals are widely divided in their interpretation of the term "direct evidence." See Costa v. Desert Palace, Inc., 299 F.3d at 852-54 (discussing divergent standards within the circuits); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580-83 (1st Cir. 1999) (identifying the "classic position," "animus plus position," and "animus position").

The existing distinction between direct and circumstantial evidence also places a higher value on direct evidence in the face

of black letter law that they are entitled to equal deference. It is axiomatic that direct and circumstantial evidence may be afforded equal weight by a finder of fact. Indeed, our jurisprudence recognizes that circumstantial evidence is, in many circumstances, more persuasive than direct evidence. See Michalic v. Cleveland Tankers, Inc., 81 S.Ct. 6, 11 (1960).

A single standard would also bring proof of causation in employment discrimination law in line with the standard of proof other areas of the law. In constitutional claims, tort claims, and National Labor Relations Act claims, plaintiffs do not need to prove "but for" causation even if the evidence is entirely circumstantial. See Price Waterhouse v. Hopkins, 109 S. Ct. at 1790 (citing Mt. Healthy City Bd. of Ed. v. Doyle, 97 S.Ct. 568, 576 (1977) (First Amendment case) and NLRB v. Transportation Management Corp, 103 S.Ct. 2469, 2475 (1983) (National Labor Relations Act)); Restatement (Second) of Torts § 431(a) ("The actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm . . . ."); Wheeler v. White, 714 A.2d 125, 127 (Me. 1998) ("Professor Prosser suggests the 'substantial factor' formulation to be an improvement over the 'but for' rule. We agree.").

Using two standards is also unworkable when trying to properly instruct juries in cases involving both direct and circumstantial evidence. Cases frequently arise that involve both types of evidence. A jury instruction that adequately sets forth both standards becomes almost comical in its complexity. Cf. Gordon v. New York City Bd. of Educ., 232 F.3d 111, 118 (2nd Cir. 2000) (holding that the jury should not even be instructed in the McDonnell Douglas framework because it is too confusing).

Mixed motives arise in cases relying exclusively on circumstantial evidence just as they do in cases involving direct evidence. In many circumstantial evidence cases, termination decisions will be based in part on legitimate factors and in part on

unlawful ones. Assuming that plaintiff can show than an unlawful factor played a motivating role in the employment decision, defendant should bear the burden of persuading the jury that it would have taken the adverse employment action in the absence of the illegitimate factor. See Price Waterhouse v. Hopkins, 109 S. Ct. at 1803 (" requiring the plaintiff to prove that *any* one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions.") (O'Connor, J., concurring).

In this case, a reasonable juror could easily have found mixed motives in Patten's termination. Patten had restrictions for over two months for a fall in the parking lot in October 1997. She had a nearly one-month leave of absence in January 1998 for a caffeine overdose. Around the time of her termination, Patten missed some time from work because of an earache and dizziness. The jury very well may have believed that these events, unrelated to her CMT, were legitimate motivating factors in Patten's termination.

The jury also could reasonably have concluded, however, that Patten's disability was a motivating factor in her termination. Evidence of discrimination was not limited to the discriminatory comments about Patten's disability made by Carey and the Personnel Manager. In addition, the jury could have drawn a reasonable inference that Wal-Mart had grown tired of providing Patten with accommodations for her CMT. The CMT-related accommodations included moving Patten from the sales associate position (for which she was hired) to a cashier position; Patten taking a three-month leave of absence for her foot surgery; and Wal-Mart accommodating Patten's restrictions when she returned from her leave. The evidence showed that Wal-Mart was becoming increasingly frustrated with providing these accommodations, although they never rose to the level of an "undue hardship."

Patten also presented evidence that the reason Paula Carey gave for her termination was false. Carey testified that she terminated Patten because of attendance. She testified that Patten's attendance only became a problem during the final two or three weeks of her employment. Wal-Mart's records, however, indicated that Patten was well within the number of permissible absences under its policies. The staffing availability reports were destroyed, and the jury was given a spoliation instruction. Further, the fact that neither Carey nor anyone else ever spoke with Patten about attendance indicates that Patten's attendance was not a concern.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 7, 2002

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-2512

SHAWNEE PATTEN,
Plaintiff, Appellant,

v.

WAL-MART STORES EAST, INC.
Defendant, Appellee.

JUDGMENT

Entered: August 14, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

APPENDIX B

No. 01-2512

SHAWNEE PATTEN,

Plaintiff, Appellant,

v.

WAL-MART STORES EAST, INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. D. Brock Hornby, U.S. District Judge]

Before
Lynch, Circuit Judge,
Coffin and Cyr, Senior Circuit Judges.

John P. Gause with whom Berman & Simmons was on brief for appellant.

Christopher W. Nanos for appellee.

August 14, 2002

COFFIN, Senior Circuit Judge. Appellant Shawnee Patten, a former employee of appellee Wal-Mart Stores East, Inc., challenges two rulings made by the district court during the trial

of her analogous claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101-12213, and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4551-4633. She asserts that the court incorrectly instructed the jury on her burden of proof and improperly excluded evidence of a state agency's finding of discrimination. Concluding that the district court did not err, we affirm the judgment in favor of Wal-Mart.

I. Background

Appellant suffers from Charcot-Marie-Tooth disease ("CMT"), a disability similar in its effects to muscular dystrophy. Although the CMT does not prevent appellant from working, it substantially limits her ability to walk or stand for a long time. Because of the illness, she often has pains in her arms and legs, and has an unusual gait. Appellant's supervisors at Wal-Mart were aware of her disability from the time she first applied for a position there. During appellant's ten-month employment, Wal-Mart repeatedly accommodated her by approving long-term leaves of absence and transferring her to less-demanding positions when she felt the CMT prevented her from adequately doing her job.

Throughout her tenure at Wal-Mart, which began on September 30, 1997, Patten's presence was marked by accommodations and absences, only sometimes because of CMT. In October 1997, Patten suffered a back injury as a result of a fall unrelated to CMT. From then through December, Patten was transferred to two new positions because she was restricted from various tasks, including standing and lifting. From January 2 through January 27, 1998, Patten took a leave of absence for a heart condition that was induced by caffeine. From February 24 through June 1, 1998, Patten took another leave of absence, related to CMT, for surgery to diminish the "hammer toes" syndrome that she had been experiencing.

When she returned to work at the beginning of June, Patten was restricted to only four hours of work per day and she could stand during only one of those hours. Patten informed Theresa Barrows, the personnel manager, of these limitations and was assigned to an alternate position for one month, after which she returned to a cashier's position.

Patten alleged that on the day she returned to work, she overheard Barrows, Gerald Tyler, the store's manager, and Paula Carey, the assistant store manager, having a conversation about her. Patten recalled hearing one of them make the following remarks: "We know Shawnee has a disability, but we're just tired of this. We're tired of her, and we just don't feel that she needs to be here."

Between June 27 and July 19, Patten missed six days of work, left early on another day (without justification), and called in sick one day. On July 19, Patten arrived at work, but felt ill. After she asked to be excused, Carey called Patten to her office and allegedly stated: "We understand that you have health problems. We understand that you are disabled, but we don't want you working in this store." When Patten asked if she was being fired because of her disability, Carey allegedly responded, "you may take it as you want, but you are not working here."

Appellant sued Wal-Mart for discriminating against her on the basis of her disability, in violation of the ADA and the MHRA, and the case proceeded to trial. All of Patten's allegations were denied by management personnel. Carey testified that she terminated Patten's employment because of non-CMT-related attendance problems that had developed during Patten's final weeks at Wal-Mart. Tyler testified that Patten was fired for "gross misconduct of the attendance policy."

At the conclusion of the evidence, the district court pertinently instructed the jury on termination as follows:

Termination. To succeed on her claim, Shawnee Patten has the burden of proving by a preponderance of the evidence that her disability was the determining factor in the decision to discharge her . . . .

To prove that a disability was the determining factor in the decision to terminate her, Shawnee Patten is not required to prove that it was the sole motivation or the primary motivation for Wal-Mart's decision, but she must prove by a preponderance of the evidence that her disability actually made the difference in causing Wal-Mart to terminate her employment.

The jury concluded that although appellant is disabled under federal and state law, her disability was not the determining factor in Wal-Mart's decision to discharge her. It therefore found in Wal-Mart's favor. This appeal ensued.

II. Discussion

A. The Contested Jury Instruction

Appellant contends that the district court incorrectly instructed the jury that her supervisor's discriminatory animus had to be "the determining factor," rather than "a motivating factor," in the decision to terminate her. We review a contested jury instruction de novo, Ponce v. Ashford Presbyterian Cmty. Hosp., 238 F.3d 20, 24 (1st Cir. 2001), and begin by looking briefly at the crowded landscape of discrimination cases.

These cases fall into two general categories. The more common genre involves evidence of discrimination that is circumstantial. In such cases the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), applies. For our purposes, it is enough to say here that after plaintiff and defendant bear their preliminary burdens, plaintiff bears the

ultimate burden of proving that the alleged discriminatory action was the determining factor in an adverse employment action.

The second and less common type involves direct evidence, evidence that unambiguously implicates an age discrimination motive. Where such evidence exists, a mixed-motive analysis applies; that is, a plaintiff's burden is tempered so that she need prove only that the discriminatory action was a motivating factor in an adverse employment decision. [1] The defendant then may "assert an affirmative defense, bearing the burdens of production and persuasion that it 'would have taken the same action in the absence of the impermissible motivating factor.'" Weston-Smith v. Cooley Dickinson Hosp., 282 F.3d at 64 (quoting 42 U.S.C. § 2000e-5(g)(2)(B)). [2]

Direct evidence, which "consists of statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision," Febres, 214 F.3d at 60, opens the door to a mixed motive analysis. The high threshold for this type of evidence requires that "mere background noise" and "stray remarks" be excluded from its definition. Id. at 61; see also Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580-81 (1st Cir. 1999) (concluding that the owner's statement that he did not "need minorities . . . on the job" could have been either discriminatory or a response to what "he perceived as an unjustified attempt to impose some sort of quota system upon his company"). "A statement that can plausibly be interpreted two different ways -- one discriminatory and the other benign -- does not directly reflect illegal animus, and, thus, does not constitute direct evidence." Id. at 583. Hence, "direct evidence is relatively rare." Id. at 580. To be sure, that burden is not insurmountable. For example, in Febres, we concluded that plaintiff presented direct evidence where an employer's criteria for an employment

decision involved "job performance, union identification, and 'in some cases, the age.'" 214 F.3d at 59.

Patten argues that the two sets of comments by her supervisors referring to her disability, see supra at 3-4, constitute direct evidence and thus take her out of the McDonnell Douglas framework. None of these statements constitutes direct evidence, however. Our standard for direct evidence requires statements that are not "inherently ambiguous," Fernandes, 199 F.3d at 583. We require statements that give us a "high degree of assurance" that a termination was attributable to discrimination. Id. at 580. Neither of the sets of statements in this case meets this test. Both are subject to the interpretation that management fully understood that appellant had a disability but could not further abide appellant's gross and repeated absenteeism. A decisionmaker's mentioning of a disability in the context of an adverse employment action cannot, without more, constitute direct evidence of discrimination. [3] Cf. id. at 583.

B. Exclusion of the Maine Human Rights Commission's Finding of Discrimination

Appellant also assigns error to the district court's refusal to admit into evidence a right-to-sue letter from the Maine Human Rights Commission ("MHRC"). At the outset, we must determine the proper standard of review for the district court's exclusion. Appellant contends that because the district court routinely excludes MHRC right-to-sue letters from the jury's purview, its decision applying that practice here must be reviewed de novo. For support she cites S.E.C. v. Sargent, 229 F.3d 68, 79 (1st Cir. 2000), in which we noted that "the interpretation of the Federal Rules of Evidence is a question of law which we review de novo."

Appellant's argument is flawed in that the district court's exclusion did not involve an interpretation of those rules. We cannot discern a material difference between the district court's

practice of excluding these types of letters in other cases and its decision to apply that practice here. At bottom, the question is one of relevancy and prejudice under Rule 403, [4] and it is well-settled that abuse of discretion is the proper standard to be applied to such issues. See, e.g., Gen'l Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997); United States v. Bradshaw, 281 F.3d 278, 284 (1st Cir. 2002).

The MHRC right to sue letter pertinently stated:

> The Commission has conducted an investigation of the . . . complaint of discrimination and has determined that there are reasonable grounds to believe that unlawful discrimination has occurred. The decision was based on information received during the course of investigation of the complaint including the Investigator's Report, any written submissions, and any oral presentations made.
>
> Pursuant to § 4612(3) of the Maine Human Rights Act, the Commission will endeavor to resolve the reasonable grounds determination. A proposed Conciliation Agreement will be forthcoming from the Commission's Compliance Officer. If no settlement is reached, the Maine Human Rights Act authorizes the filing of a civil action in Superior Court. * * * The Maine Human Rights Act provides that you may pursue this matter on your own.

Appellant asks us to adopt a rule that "reasonable grounds findings from the MHRC are per se admissible." For support, she cites Plummer v. Western International Hotels Co., 656 F.2d 502, 505 (9th Cir. 1981). The Ninth Circuit's determination of per se admissibility of EEOC determinations cannot be squared with our precedent. In Smith v. Massachusetts Institute of Technology, 877 F.2d 1106, 1113 (1st Cir. 1989), we considered the admissibility of EEOC findings, and agreed with the Seventh Circuit that "a rule of per se admissibility of the investigative file would clearly undercut

the district court's function as independent fact-finder. The better approach is to permit the district court to determine, on a case-by-case basis, what, if any, EEOC investigator materials should be admitted at trial." Id. (quoting Tulloss v. Near N. Montessori Sch., 776 F.2d 150, 154 (7th Cir. 1985). Moreover, Smith concerned the admissibility of an investigative file, containing statements and other evidence of the alleged discrimination. Here, the right-to-sue letter states only a conclusory probability of discrimination, unsupported by any relevant facts, and thus on its surface lacks the probative content of the excluded investigative file challenged in Smith.

The district court's routine exclusion of the MHRC letter is consistent with Smith's stated approach. It seems to us that the district court's exclusion reflects a tacit balancing under Rule 403. See United States v. De La Cruz, 902 F.2d 121, 123 n. 1 (1st Cir. 1990). Although the findings of a fact-finding agency are entitled to deference, see Blizard v. Fielding, 572 F.2d 13, 16 (1st Cir. 1978), we cannot say that the district court abuses its discretion when it concludes that such an agency determination, unaccompanied by relevant facts, tends to be more prejudicial than probative.[5]

Affirmed.

1. We need not get into the question of whether mixed-motive analysis is available on strong circumstantial evidence of discrimination. See Weston-Smith v. Cooley Dickinson Hosp., 282 F.3d 60, 64 (1st Cir. 2002). For present purposes, we will deal with the case in terms of direct evidence. There was no strong circumstantial showing of discrimination here.

2. This circuit has noted, but not resolved, the question of whether that portion of the 1991 Civil Rights Act which amended Title VII to provide for limited relief against defendants who would have taken the same action even absent their discriminatory motive, see 42 U.S.C. § 2000e-5(g)(2)(B),

applies to cases under the ADA. See Thomas v. Contoocook Valley Sch. Dist., 150 F.3d 31, 42 n.6 (1st Cir. 1998). Giving plaintiff the benefit of the doubt, we assume arguendo that the 1991 Act standards would apply.

3. Given our determination that no direct evidence was presented here, we need not consider appellee's contention that appellant waived her right to appeal on this issue by failing to object to a portion of the magistrate judge's recommended decision. See Seahorse Marine Supplies v. P.R. Sun Oil Co., __ F.3d __, 2002 WL 1431766, at *14 n. 15 (1st Cir. 2002).

Appellant alternatively requests that we do away with the distinction between circumstantial and direct evidence, and instead employ a single standard of proof for all evidence. Although we are not unsympathetic to the plight of a civil rights plaintiff attempting to prove her case, the abundance of caselaw in this circuit requires that we do not reconsider that duality here.

4. Rule 403 allows a court to exclude admissible evidence that is more prejudicial than probative. See Fed. R. Evid. 403.

5. Appellant alternatively argues that even without a per se rule, the district court's exclusion of the MHRC letter constitutes reversible error. Appellant does not explain how this letter, if admitted, would have changed the jury's outcome. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHAWNEE PATTEN	*	
	*	Civil No.
Plaintiff	*	00-213-PH
v.	*	
	*	Entered on the
WAL-MART STORES EAST,	*	Docket:
INC.	*	09/19/2001
Defendant	*	

JUDGMENT

In accordance with the Order Affirming the Recommended Decision dated July 12, 2001, judgment is hereby entered in favor of Wal-Mart Stores East, Inc. and against Shawnee Patten.

On September 18, 2001 this action came on for trial before the Court and a jury, the Honorable D. Brock Hornby, United States Chief Judge, presiding. The issues having been duly tried, and the jury having rendered its verdict, judgment is hereby entered as to Wal-Mart Stores East, Inc. and against Shawnee Patten.

William S. Brownell
Clerk

By: Marie M. Cross
Deputy Clerk

Dated: September 19, 2001

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHAWNEE PATTEN	*	
	*	Civil Action
Plaintiff	*	Docket No.
v.	*	00-213-PH
	*	
WAL-MART STORES EAST, INC.	*	
	*	
Defendant	*	

PARTIAL TRANSCRIPT OF PROCEEDINGS

THE COURT...

B. Termination. To succeed on her claim, Shawnee Patten has the burden of proving by a preponderance of the evidence that her disability was the determining factor in the decision to discharge her.

It is not for you to decide whether or not Shawnee Patten's termination was fair or wise. The only question you are to consider is whether Wal-Mart terminated Shawnee Patten's employment because of a disability.

The law does not prevent employers from holding disabled persons to reasonable rules of conduct. It is not designed to insulate individuals with disabilities from disciplinary actions that would be taken against any employee regardless of disability.

To prove that a disability was the determining factor in the decision to terminate her, Shawnee Patten is not required to

prove that it was the sole motivation or the primary motivation for Wal-Mart's decision, but she must prove by a preponderance of the evidence that her disability actually made the difference in causing Wal-Mart to terminate her employment.

You may not find that disability was the determining factor in Wal-Mart's decision to terminate Shawnee Patten unless you find that it was a determining factor for one or more particular managers or supervisors involved in the termination decision.

Shawnee Patten is not required to produce direct evidence of unlawful motive. Intentional discrimination, if it exists, is seldom admitted, but is a fact that you may infer from the existence of other facts.

Trial Transcript at pp. 279 (lines 17-25), 280 (lines 1-20).

MR. GAUSE...

With respect to the jury instructions, as I requested earlier, plaintiff would request an instruction on the mixed motive analysis. It's our position that the circumstances here do justify an instruction on mixed motive, which would lead to standard of a motivating factor as opposed to the determinative factor in reaching the issue of causation.

In addition to that as we discussed earlier, plaintiff would request an instruction on the pretext instruction, that currently exists, that the standard for causation be a motivating factor as opposed to the determinative factor.

Trial Transcript at p. 288 (lines 6-16).

THE COURT...

Let me just explain on the record the reasons for my overruling the objections to the charge. On the Maine Human Rights Commission finding, I'm satisfied that the defense argument did not go beyond the restrictions I imposed. There was no suggestion that I heard that the claim against Ground Round was frivolous.

On the mixed motive request, I am content that under the standards of the First Circuit as I understand them that the evidence here did not justify a mixed motive charge. The First circuit has said that there must be direct evidence and that ambiguous evidence will not suffice. I'm thinking in particular of the Cape Verde case, V-E-R-D-E. I believe that the comments as described here as recounted in the plaintiff's testimony still remain ambiguous within the standards of that case.

The third objection is that the causation standard I've used here is the determining factor, whereas the plaintiff would prefer the standard, a motivating factor. I believe the charge as I've given it is correct. Certainly the First Circuit has approved this kind of language in ADEA cases, age discrimination cases. I'm thinking of the Greenberg v. Union Camp Corporation case.

It's also approved it in retaliation cases, Tanca v. Nordberg, and the Provencher v. CVS are examples of that.

I agree it's a little more uncertain in a straight Title 7 or ADA case. The case that comes to mind is Carey v. Mount Desert Hospital where the panel yielded three opinions, Judges Coffin and Aldrich assumed there was an error in a motivating factor or said they didn't have to resolve that because they found Judge Brody's later instruction took care of it. Judge Stahl dissented and required a but for type of instruction. I'm

satisfied that that is the correct instruction under all the case law.

Trial Transcript at pp. 290 (lines 2-25), 291 (lines 1-9).